Transport Service Co. *and* Charles Hennessey. Case 13-CA-19696

September 3, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 22, 1981, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, Respondent filed an answering brief and cross-exceptions, and the General Counsel filed an answering brief to Respondent's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge only to the extent consistent herewith.

Charles Hennessey began working for Respondent in May 1979 out of its Chicago terminal, carrying liquid cargo. On January 17, 1980, Respondent assigned Hennessey to pick up a load the following morning for delivery in Michigan, a run that required driving over the highways of Illinois, Indiana, and Michigan. Hennessey arrived at the shipper's facility and, while waiting for the truck scale to become available for loading, noted that the bill of lading called for 44,000 pounds of cargo, which he thought would make the total truck weight exceed legal limits. He discussed this with the shipper's "loader," who told Hennessey to call Respondent's dispatcher if there was going to be a problem. Hennessey called the dispatcher, stipulated here to be a supervisor and agent of Respondent, who told Hennessey to call him back to report the full weight once the truck was loaded. Loaded, without the driver, the truck weighed 73,660 pounds, thus over the 73,280-pound limits of Illinois and Indiana[2] and Hennessey so informed the dispatcher who told him to drive the truck with that load, using a toll road in Indiana to avoid that State's weighing station. The dispatcher stated that this was what other drivers did, and that Respondent would pay the toll necessitated by this diversion.

Hennessey told the dispatcher he would not haul an overweight load.[3] The dispatcher then discussed the matter with the terminal manager, and advised Hennessey that the terminal manager said he should haul the load and that, if he refused, the dispatcher would assign another driver to haul the load. Hennessey refused, and the dispatcher discharged him for so refusing. Later the same day, Hennessey returned to the terminal where he left an envelope containing copies of the *Banyard* court decision and the Fitzsimmons memorandum for the attention of the terminal manager.

The following Monday, January 21, Hennessey called the terminal to inquire about his final paycheck. In the course of the conversation Hennessey was told that the terminal manager wanted to talk with him, and an appointment was scheduled for the next morning. At the scheduled meeting, Hennessey asked whether, in fact, he had been dis-

[1] We agree with the Administrative Law Judge that deferral to the decision of the joint grievance committee concerning Hennessey's discharge is not warranted for the reasons set forth by the Administrative Law Judge and also because its decision upholding that discharge is clearly repugnant to the purposes and policies of the Act. For the reasons set forth in his dissenting opinion in *Terminal Transport Company, Inc.*, 185 NLRB 672 (1970), Member Jenkins would find that the lack of a neutral member on the panel constitutes an independent reason sufficient in itself to render inappropriate deferral to the grievance committee decision in this case.

[2] Official weighing normally required the driver to stay in the truck, thus including his weight. Hennessey weighed approximately 250 pounds.

[3] At this time Hennessey was aware of the following developments:

(1) In *McLean Trucking Company*, 202 NLRB 710 (1973), a majority of the Board, Members Fanning and Jenkins dissenting, dismissed a complaint alleging that James Banyard was discharged unlawfully for refusing to drive a truck that was overloaded according to state law. The Board majority chose not to entertain the complaint but rather to defer to an award rendered by a joint grievance committee pursuant to the Teamsters National Master Freight Agreement, denying the grievance filed with respect to Banyard's discharge. Banyard sought review of the Board's Decision in the United States Court of Appeals for the District of Columbia Circuit, which held that the grievance committee's award "grants the Company a license to violate state law and as such is void as against public policy and repugnant to the purposes of the National Labor Relations Act." *Banyard* v. *N.L.R.B.*, 505 F.2d 342, 347 (1974). The court remanded the case to the Board for consideration of the unfair labor practice issues. On March 6, 1975, the Board issued a Supplemental Decision and Order affirming the original decision of the Administrative Law Judge, who had found that the discharge violated Sec. 8(a)(1), and ordered Banyard's reinstatement with backpay. *McLean Trucking Company*, 216 NLRB 925 (1975).

(2) On March 13, 1975, Frank Fitzsimmons, then president of the International Brotherhood of Teamsters, issued a memorandum addressed to "all Local Unions Signatory to the National Master Freight Agreement." The memorandum concerns Federal and state laws regarding maximum loads and states, among other things, that "If a truck is overloaded under the laws of the state where it is to be driven, our members are not required to pull it." It further states, "It has been our position that these laws are designed—or should be—for the safety of the driver, the industry, and the general public."

(3) Sometime after the final decision in *McLean Trucking*, PROD (Professional Drivers Council), a reform group of Teamsters members (see *Roadway Express, Inc.*, 239 NLRB 653, 656, fn. 4 (1978)) whose attorney had represented Banyard in court, circulated a bulletin summarizing the proceedings and concluding with a request for support which states that the *Banyard* case will "serve as a legal precedent which will enable all other drivers to be secure in their legal rights," asks drivers to become members of PROD, and claims PROD to be "the only organization which is actively striving to improve the working conditions of the American trucker."

At the time of his refusal to haul the overweight load, Hennessey was a member of PROD.

charged. The terminal manager said he had, and that a discharge letter would be in the mail. During a discussion of overloads, the manager asked Hennessey if he thought the few hundred pounds involved was all that important. Hennessey said it did not seem important enough to put his job on the line for, but that it all could have been resolved if the dispatcher had instructed the loader to cut the load weight by 500 or 600 pounds. The terminal manager replied that he would not be dictated to by a driver, and reiterated that other drivers hauled overloads and that Respondent would pay tolls in Indiana to use the toll road.[4] Hennessey then asked him whether he had read the *Banyard* decision and the Fitzsimmons memorandum, and was told that, as to the Fitzsimmons memorandum, Respondent was not signatory to the National Master Freight Agreement, and that, as to the *Banyard* decision, he was not in a position to say whether it was good law or bad law, but that "they ran the company by what they considered to be the best management techniques." The same day, the manager sent Hennessey a discharge letter, stating, among other things, that under Illinois law there is a 2,000-pound "tolerance," and a driver could not be fined or ticketed for an overweight of less than 2,000 pounds.

Discussion and Conclusion

Unlike the Administrative Law Judge, we find that Hennessey's refusal to haul a load which exceeded the legal weight limits in two States through which he had to drive was protected concerted activity. We agree with the Administrative Law Judge that, notwithstanding the "tolerances" in both States within which carriers and drivers were insulated from criminal liability, Hennessey had a reasonable basis for believing that the action Respondent demanded of him was unlawful. Further, although we do not require employees to be correct in their legal opinions, we note that, while Indiana has a 1,000-pound "tolerance" for purposes of criminal prosecution, a driver is jointly and severally liable with the owner of the vehicle for any damage to a public highway or bridge as a result of violations of the standard weight limit. Indiana Motor Vehicle Act, Sec. 9-8-1-18. Certainly Respondent recognized the proposed load as being in violation of Indiana law, and communicated its understanding to Hennessey when it directed him to avoid the highway on which the official weighing station was located and offered to pay an otherwise unnecessary toll in order to do so. Similarly, and regardless of the state of his knowledge of the precise legal consequences, Hennessey had reasonable cause to believe that he was being asked to violate Illinois weight laws. His refusal to violate state laws was, presumptively, concerted protected activity. *Varied Enterprises, Inc. d/b/a Private Carrier Personnel*, 240 NLRB 126, 131–132 (1979); *Ogden & Moffett Company*, 254 NLRB 1349, 1352 (1981). The *Banyard* case itself is also instructive in this regard, for the court, albeit in connection with the issue of deferral to an arbitration award, admonished that:

> Regardless of the purpose of the Ohio [weight limit] statute, it remains axiomatic that it was still the law; for this or any other company to require its employees to act in violation thereof can never be upheld by the Board or this court. [505 F.2d at 347.]

Rather than rebut the presumption that Hennessey's refusal to exceed legal limits was in furtherance of a concerted collective interest of employees, the facts leading up to his action reinforce that presumption. The Fitzsimmons memorandum, although technically addressed only to local unions signatory to the National Master Freight Agreement, evinces a collective interest in strict compliance with state load restrictions for reasons of safety, and the PROD literature implicitly seeks to enlist drivers to enforce the principles set forth in the *Banyard* decision for the mutual protection of drivers generally.[5]

In reaching a different conclusion, the Administrative Law Judge erred by focusing on Hennessey's personal motivation for refusing to haul the overweight load instead of on the nature of his activity. *Ohio Valley Graphic Arts, Inc.*, 234 NLRB 493 (1978); *Congoleum Industries, Inc.*, 197 NLRB 534, 547 (1972). Thus, Hennessey was asked on the witness stand (without objection) why he refused the load. He answered that there were three reasons:

> Number one, because it is against the law. Secondly, is because it is self-defeating for a driver to take excess material on a truck and thereby cut out the number of loads that are available, and thirdly because there is a safety problem. The more weight there is, the top-

[4] This reference to the Indiana tolls presumably relates to the previous suggestion to avoid that State's weighing station.

[5] In *Roadway Express, Inc., supra*, we affirmed the Administrative Law Judge's finding (239 NLRB at 660, fn. 15) that activity on behalf of PROD, not only with respect to union reform but also "as a vehicle for employee expression of concerns over their conditions of employment," is protected concerted activity under Sec. 7. See also *United Parcel Service, Inc.*, 252 NLRB 1015, 1018 (1980), and cases cited therein.

Member Fanning concludes that Hennessey was acting in response to the union appeals in the Teamsters and PROD literature when he refused to drive the overloaded truck.

heavier the truck is and the more difficult it is to brake.

However, the Administrative Law Judge credited Hennessey's explantions only to the extent that he was motivated by the excessive weight under Illinois (not Indiana) law, and by his desire to preserve work for drivers. The Administrative Law Judge concluded that Hennessey acted solely in an individual capacity, unconcerned with safety or any other concerted interest.

We need not labor over such questions as how it was possible to divine that Hennessey sought to avoid violating Illinois law but consented to violating Indiana law based on the same weight limit. The fact is, Hennessey refused to haul the load because it was overweight and he communicated that reason to Respondent, for which Respondent discharged him. Once it has been established that the reason is one which is of common concern to employees with respect to their terms and conditions of employment, our inquiry into the private motivations for asserting such a reason is limited to the question of whether it was asserted in good faith or maliciously (*Varied Enterprises, Inc., supra*, 240 NLRB at 132), and here we have found that it was asserted in good faith.[6]

We find it irrelevant that Hennessey conceded he knew of no safety problem in hauling that particular overweight load, for this falls far short of negating the drivers' safety interest as expressed in the Fitzsimmons memorandum, in adhering to weight limits generally. Moreover, even if we were to accept the Administrative Law Judge's findings as to Hennessey's motives, his finding that Hennessey was motivated in part by work preservation for his fellow drivers would make his refusal concerted. Accordingly, we find that Respondent violated Section 8(a)(1) of the Act by discharging Hennessey because he engaged in protected concerted activity.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Charles Hennessey, we shall order Respondent to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings suffered by reason of the discrimination against him, plus interest. Backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950); interest shall be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Transport Service Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they refuse to haul overweight loads.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Charles Hennessey immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for lost earnings in the manner set forth herein in "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Chicago, Illinois, central terminal copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily

[6] We find insufficient to establish malice Hennessey's admission that one of the reasons he refused to violate the law for Respondent was that "everytime I get a paycheck I find there is something wrong with it and I have to fight to get my money."

[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees because they refuse to haul overweight loads.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Charles Hennessey immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for lost earnings, plus interest.

TRANSPORT SERVICE CO.

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was heard pursuant to due notice on October 30, 1980, in Chicago, Illinois.

The charge was filed on March 18, 1980. The complaint in this matter was issued on April 29, 1980. The issues concern whether Charles Hennessey engaged in protected concerted activity in refusing to drive a truck which had a load which was over the weight limit as proscribed by state law or Federal regulations, and whether Hennessey was discharged for such protected concerted activity in violation of Section 8(a)(1) of the Act.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The facts herein are based on the pleadings and admissions therein.

At all times material herein, Respondent, an Illinois corporation, with an office and place of business in Chicago, Illinois, herein called Respondent's facility, has been engaged in the interstate and intrastate transportation of freight.

During the calendar year ending December 31, 1979, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Illinois directly to points outside the State of Illinois.

As conceded by Respondent and based on the foregoing, it is concluded and found that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Preliminary Issues—Supervisory Status*[1]

At all times material herein, the following named persons occupied the positions set forth opposite their respective names, and are now, and have been at all times material herein, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Robert E. Lee, terminal manager, and John Alkofer, dispatcher.

B. *The Facts*

1. Charles Hennessey commenced employment with Respondent in May 1979 and continued in such employment until terminated on January 18, 1980. Hennessey was employed as a driver of tractor-trailers (tankers) which carried a liquid cargo.[2] Hennessey was based at Respondent's Chicago (Central) terminal and did not have a regular work assignment. Rather, Hennessey was on the "extra board" and received his assignments in accordance with his position thereon when assignments were to be made from the "extra board."

2. Respondent has a number of terminals and authority to operate in many States. The only terminal involved in this proceeding is the Chicago (Central) terminal. The only States relevant to this proceeding are Illinois, Indiana, and Michigan.

3. Respondent's operations are governed by contract, Federal and state law, and Federal and state agency rules and regulations.

a. The collective-bargaining agreement between Respondent and Local 705, International Brotherhood of Teamsters, provides as follows:

[1] The facts are based on the pleadings and admissions therein.

[2] Sometimes referred to as trucks or tankers.

ARTICLE 14, SECTION 2:

All Truck Drivers and Owner-Drivers covered by this Agreement shall be paid for all time spent in the service of the Employer. Rates of pay provided for by this Agreement shall be minimums. Time shall be computed from time that the Employee is ordered to report for work and registers in and until the time he is effectively released from duty. All time spent in loading, unloading, and delays as a result of overloads or certificate violations involving Federal, State, or City regulations, which occur through no fault of the Driver or Owner-Driver shall be paid for. Drivers shall be paid for time lost due to breakdowns or delays caused by impassable highways on the basis of twelve (12) hours on and twelve (12) hours off. Such payment for Driver's or Owner-Drivers time when not driving shall be the hourly rate.

* * * * *

ARTICLE 16, SECTION 1:

If any grievance arises during the term of this Agreement and cannot be settled between the parties, then a Grievance Board of six (6) members, three (3) Company and three (3) Union, shall meet monthly to satisfactorily resolve said grievances. The decisions of the grievance board shall be final and binding on all parties.

* * * * *

ARTICLE 33:

There shall be no strike or lockout during the term of this Agreement. The Union shall not be responsible for unauthorized acts of any person merely because he is a member of the Union, and the Employer shall not file any suit against the Union for damages based on the claim that the Union is responsible for the unauthorized act of any person solely because he is a member of the Union or because he is represented by the Union. The Company shall be privileged to discipline employees responsible for or engaging in such unauthorized activities, including the right to discharge, which discipline by the Company shall not be subject of a grievance, unless such grievance is filed by an authorized officer of the Union, within ten (10) days following the effective date of the disciplinary action. If the final decision of the Grievance Board is not lived up to, the aggrieved parties are relieved from the no strike or no lockout pledge made herein.

b. The applicable statutes of Illinois, Indiana, and Michigan relating to allowable weight loads for trucks or tractor-trailers may be summarized as follows:[3]

Illinois: The Motor Vehicle Act of Illinois, chapter 95-1/2, section 15-111, contains provisions that motor vehicle combinations having five or more axles with a minimum distance to the nearest foot between extreme axles of 44 feet or more have a maximum gross weight of 73,280 pounds.

Further, the Motor Vehicle Act of Illinois, chapter 95-1/2, section 15-112(a), (b), (c), (d), (e), and (f) provides as follows:[4]

§ 15-112. Officers to weigh vehicles and require removal of excess loads

(a) Any police officer having reason to believe that the weight of a vehicle and load is unlawful shall require the driver to stop and submit to a weighing of the same either by means of a portable or stationary scales. If such scales are not available at the place where such vehicle is stopped, the police officer shall require that such vehicle be driven to the nearest available scale that has been tested and approved by the Illinois Department of Agriculture.

(b) Whenever an officer, upon weighing a vehicle and the load, determines that the weight is unlawful, such officer shall require the driver to stop the vehicle in a suitable place and remain standing until such portion of the load is removed as may be necessary to reduce the weight of the vehicle to the limit permitted under this Chapter, or to the limit permitted under the terms of a permit issued pursuant to Sections 15-301 through 15-318 of this Chapter, and shall forthwith arrest the driver or owner. All materials so unloaded shall be cared for by the owner or operator of the vehicle at the risk of such owner or operator.

(c) The Department of Transportation may, at the request of the Department of Law Enforcement, erect appropriate regulatory signs on any State highway directing second division vehicles to a scale. Every such vehicle, pursuant to such sign, shall stop and be weighed. Any driver of a vehicle who disobeys such regulatory signs is guilty of a Class A misdemeanor.

(d) Whenever any axle load of a vehicle exceeds the weight limits permitted by paragraph (a) of Section 15-111 of this Chapter by 2,000 pounds or less, the owner or operator of the vehicle must shift or remove the excess so as to comply with paragraph (a) of Section 15-111. Whenever the gross weight of a vehicle exceeds the weight limits of paragraph (b) of Section 15-111 of this Chapter by 2,000 pounds or less, the owner or operator of the vehicle must remove the excess. In either case no arrest ticket shall be issued to the owner or operator of the vehicle by any officer if the excess weight is either shifted or removed as required by this paragraph.

[3] Both the General Counsel and Respondent have filed briefs which contain factual contentions considered by me as proposed findings of fact. Wherein the record supports such proposed findings of fact, I have adopted the same as my own in total or as modified.

[4] Prior to January 1, 1980, the tolerance of weight was 1,000 pounds instead of 2,000 pounds as referred to in sec. 15-112(d).

(e) Whenever an axle load of a vehicle exceeds axle weight limits allowed by the provisions of a permit an arrest ticket shall be issued, but the owner or operator of the vehicle may shift the load so as to comply with the provisions of the permit. Where such shifting of a load to comply with the permit is accomplished, the owner or operator of the vehicle may then proceed.

(f) Any driver of a vehicle who refuses to stop and submit his vehicle and load to weighing after being directed to do so by an officer or removes or causes the removal of the load or part of it prior to weighing is guilty of a business offense and shall be fined not less than $500 nor more than $2,000.

Section 15-113 of chapter 95-1/2 was amended in 1979 with such amendments effective as of January 1, 1980. It appears that prior to January 1, 1980. weight violations relating to section 15-111 involved fines for weight in excess of 1,000 pounds. The Illinois legislature in 1979 appears to have passed two amendments to the existing section 15-113 relating to fines for violation of section 15-111. In any event, all counsel appear to agree that the Illinois law (sec. 15-113 in existence in January 1980 provided for *fines* only as to excessive weights in the amount of 2,000 pounds or more. It appears that prior to January 1, 1980, fines were provided for violations as to excessive weights in the amount of 1,000 pounds or more. Considering the two "amendments," since the question of excessive weights in this case involved weights which were excessive but less than 1,000 pounds excessive, it would make no difference as to the ultimate findings as to which amendment to the law was effective.

Indiana: The Indiana Motor Vehicle Statute regarding size and weight (Resp. Exh. 2) provides in article 8, chapter 1, sec. 9-8-1-12(1) for a gross weight limitation of 73,280 pounds. In addition, other sections may be summarized to the following effect:

Section 9-8-1-13(b): vehicle found overweight to be retained in custody of apprehending officer until excess weight removed.

Section 9-8-1-13(c): driver responsible for notifying shipper of impoundment of vehicle.

Section 9-8-1-13(d): driver who knowingly causes truck to be overloaded is criminally liable, and court may determine extent of liability among driver, carrier, and shipper.

* * * * *

Section 9-8-1-17: any peace officer may require truck to stop for weighing and require driver to go to scale for this purpose.

Section 9-8-1-18: "Anything to the contrary herein notwithstanding, the owner and operator of any vehicle, object or contrivance unlawfully operated or moved on any public highway or bridge thereon shall be jointly and severally responsible for all damages to such highway or bridge as a result of any violation of this act."

* * * * *

Section 9-8-1-22: criminal penalties for violation of weight limitations "It is a defense to a charge of violating any of the weight limitations in section 12 that the total of all excesses of weight under those limitations is less than one thousand (1,000) pounds."

c. Federal regulations relating to Respondent's operations also reveal the following provision:

Title 49—Code of Federal Regulations, Section 392.2

Every motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Highway Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Highway Administration regulation must be complied with.

4. There is no evidence or reason to believe that Respondent, as a practice, intentionally dispatched tractor-trailers which were overweight[5] to the extent of having weight beyond the weight tolerance indications as involved the States whose highways would be driven on.

Alkofer credibly testified that he, as a practice, had dispatched tractor-trailers which were overweight but within the tolerance limitations, that such tractor-trailers had excessive weights similar to the excessive weight on Hennessey's truck and lower weights.

The overall facts reveal that other drivers had driven tractor-trailers with such "overweights." There is no evidence of complaints by such drivers to Respondent, to the Union, or to each other.

5. During Hennessey's employment by Respondent, Hennessey was concerned about assignments or possible assignments to drive tractor-trailers which had loads in excess of weights set forth by statute as the maximum allowable weights in certain States. The facts appear to indicate that as to most, if not all, instances that occurred prior to January 18, 1980, Hennessey had not been assigned to drive trucks which had weights that exceeded the statutory weight limits. There may have been an occasion when Hennessey did drive a tractor-trailer which had a weight load excessive of the statutory limit set by a State wherein Hennessey had to drive on the highways of such State.[6]

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[5] As used in this Decision, whether specifically expressed or not, the term overweight or overload when used as describing a truck or tractor-trailer is meant to include the weight of the truck/load driver and/or tractor-trailer/load/and driver.

[6] Considering the totality of all of the facts, whether Hennessey on one or two occasions had or had not driven trucks with such excessive weights would not affect the overall findings herein.

While an employee of Respondent, Hennessey was a member of an organization called PROD. This organization was fully named Professional Driver's Council on Safety. Prior to January 18, 1980, Hennessey was aware of "leaflets" by PROD relating to court and NLRB decisions concerning a Jim Banyard. Such leaflet or leaflets referred to PROD having pursued Banyard's case successfully through the NLRB and having secured a decision with remedy therein of reinstatement of Banyard by McLean Trucking Company and of a requirement that McLean make Banyard whole for loss of backpay. Hennessey was aware of a decision of a U.S. court of appeals relating to an arbitration of Banyard's discharge, and of the relation thereto of state law concerning truck weight limitations. Hennessey was aware that the court decision set forth approval of a statement by a dissenting (NLRB) Board member in an underlying case as follows: "No contract provision or arbitration award can permit an employer to require his employees to violate State laws or to create safety hazards for themselves or others." Hennessey, during his tenure of employment by Respondent, was also aware of a bulletin from Fitzsimmons (president of the International Teamsters Union) to "All Local Unions Signatory to the National Master Freight Agreement," dated March 13, 1975. Said bulletin referred to Federal law allowing States to authorize certain maximum weights on trucks traveling on interstate highways, including an overall gross weight of 80,000 pounds. Said bulletin set forth "If a truck is overloaded under the law of a state where it is to be driven, our members are not required to pull it."

6. On Thursday, January 17, 1980, Respondent assigned Hennessey a "run" for Friday, January 18, 1980. The "run" involved picking up a load in Chicago, Illinois, from a customer-shipper called Corn Sweetner or Marigold, and delivering the same to a customer of Marigold in Benton Harbor, Michigan.

Marigold was the largest customer of Respondent's Central terminal in Chicago, Illinois. In such regard Marigold shipped five or six loads per day. It appears that shippers in the sweetner business are strict in demanding specific pickup and delivery times, and that the competitive nature of the business warrants a belief that care should be given in meeting such demands.

On January 18, 1980, apparently between 4 and 4:30 a.m., Hennessey was dispatched and picked up his "bills" and tractor-trailer at Respondent's Chicago Central terminal. Hennessey performed a pretrip inspection, found the tractor-trailer to be in safe condition, and completed a preinspection report. Hennessey then drove to the Marigold facility in Chicago, Illinois. At the Marigold facility, Hennessey noted that the bill of lading reflected that the load that Hennessey would be transporting would be 44,000-pounds of corn sweetner or liquid. Hennessey told the Marigold dispatch employee that he thought his tractor-trailer would be overloaded with such a load. Such employee told Hennessey that he should call Respondent's dispatcher. Hennessey telephoned Respondent's dispatch office and spoke to dispatcher Alkofer and indicated that he thought the tractor-trailer would be overloaded with a 44,000 pound load. Alkofer told Hennessey to wait until the tractor-trailer with load was weighed, to report the weights at such time, and that he would then let him know what to do. Alkofer told Hennessey that there really was not anything to worry about overloads, that other drivers pulled such overloads. Hennessey had to wait for 10 to 15 minutes before the tractor-trailer was weighed. The tractor-trailer weighed 29,600 pounds. Hennessey then telephoned Alkofer, told Alkofer that the tractor-trailer weighed 29,600 pounds and that if loaded with 44,000 pounds that he would end up heavy, between 500 and 1,000 pounds overweight. Alkofer told Hennessey that he should "pull"[7] such a load. Hennessey then told Alkofer that if the load were heavy that he would not pull it. Alkofer told Hennessey that other drivers pulled overloads, and that he should let the tractor-trailer be loaded and weighed and then call him back. Alkofer then asked to speak to the loader and Hennessey turned the telephone over to the Marigold loader.

Dispatcher Alkofer spoke to the Marigold loader and ascertained in fact that the Marigold load would weigh 44,000 pounds.[8]

Following these events, the Marigold loader loaded Respondent's tractor-trailer. When loaded, Respondent's tractor-trailer weighed 73,660 pounds.[9] Hennessey had the loader to give him a printout on scratch paper of such weight.

Hennessey then telephoned dispatcher Alkofer and told him that the tractor-trailer when loaded weighed 73,660 pounds. Alkofer asked Hennessey if he were going to pull the load. Hennessey told Alkofer that he would not pull the load. Alkofer told Hennessey that all he had to do was to take the Indiana turnpike to Route 39 to avoid the scale in Indiana, that this was, in effect, what other drivers did, and that Respondent would pay his toll.[10] Hennessey told Alkofer that he would not move an overweight load, and that he did not have to move an overweight load, and that he did not have to do anything for "Transport Service, a company that was always trying to . . . him."

What occurred then is revealed by the following credited excerpts from Hennessey's testimony.[11]

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[7] Drive the tractor-trailer with such load.

[8] Problems relating to overloading as to axles are sometimes solved by a shifting of a load. Overall overweight problems at times are solved sometimes by removal of certain types of equipment carried on the tractor-trailer. Thus, if the receiver of the goods has "unloading" hoses, etc., such hoses as are normally on the tractor-trailer could be removed and some weight be eliminated. Sometimes weight problems can be eliminated by substituting a tractor which has less weight for a heavier tractor. It appears that Alkofer was seeking to find out if the "load" would weigh less than expected and thus that the problem of weight might not even exist. It is also indicated that Alkofer was postponing the moment of decision with the hope that he might complete his workshift before the ultimate decision had to be made and thus leave the problem for someone else.

[9] The trailer may be described as a "tank"-type trailer.

[10] The facts are based on a composite of the credited aspects of the testimony of Hennessey and Alkofer. I credit Hennessey's testimony over Alkofer's where in conflict. Hennessey appeared a thoroughly frank, forthright, and truthful witness. Much of Alkofer's testimony appeared to be based on a belief that he said or did things as a matter of practice, and on a basis of probability that he had done or said things.

[11] It is clear that Alkofer telephoned the terminal manager and received instructions as to how to handle the matter of Hennessey's refusal

Continued

He asked me to wait there, he told me he would have to call Bob Lee, the terminal manager, and he would call me back. So I waited, I think, maybe 10 or 15 minutes. Johnny called me back. He said he had talked to Mr. Lee, and Mr. Lee had instructed him to tell me that I should pull the load, and that if I refused, that Johnny was to get another driver, and that I was to wait there for him. And he asked me one more time if I would be willing to pull the overload, and I again refused.

He then said that he had been instructed to tell me that another driver would be coming and that I was supposed to come back into the terminal. I asked him at that time if I was being discharged, and he said he didn't know. And I said, all right, and I sat there and waited for probably about a half-hour, 45 minutes, till the other driver came.

Hennessey then returned to Respondent's terminal in Respondent's pickup truck.[12] What occurred then is revealed by the following credited excerpts from Hennessey's testimony.

I reported to the dispatch office. I asked Johnny if he was going to have another load for me. It was then he informed me that I had been discharged. I told him that I couldn't believe it, that I didn't think that the company was going to fire a man for refusing to pull an overload. He said that those were his instructions.

I went over to the table which is provided in the driver's room. I made out my logs and my pay sheets, and on the back of the pay envelope, and wrote on all of them that I was being discharged for refusing to pull an illegal overload. And I returned the envelope to Johnny.

When I first walked in there, there were no other witnesses. Then a Mr. Hunter, who—I,m not sure his exact title, but I believe he is, like, in charge of the maintenance of the equipment and that stuff, a supervisor—was in the office, and I asked Johnny if he would restate again in front of a witness that I was being fired for refusing to pull an overload. And he said yes, that he would, and he so stated. And he kind of smiled and said, "This is the first time I've had to fire anybody in like a year."

With that I turned, and I left the property.

Later, Hennessey contacted his union steward and made arrangements to see him around 4:30 p.m. Around 4:30 p.m., Hennessey met Danny Robinson, the union steward, and gave him two documents, a copy of a court decision (*Banyard* v. *N.L.R.B.*, reported at 505 F.2d 342, and following pages), and a copy of a March 13, 1975, bulletin from Teamsters International President Frank E. Fitzsimmons to "All Local Unions Signatory to the National Master Freight Agreement." Hennessey asked the union steward to give the documents to Terminal Manager Lee.

On Monday, January 21, 1980, Hennessey telephoned Respondent's terminal to make inquiry about his final paycheck. What occurred is revealed by the following credited excerpts from Hennessey's testimony.[13]

Well, sometime Monday morning I had called the terminal to find out about my final paycheck. As I remember, I spoke with Danny. He informed me that before I would get my final paycheck I would have to return the safety equipment issued by the company. And that upon doing that, they would give me the final paycheck.

I thought he was about to hang up, and then he told me that Mr. Lee wanted to talk to me. Mr. Lee got on the phone. I really don't remember the substance of the conversation, but it ended up that I was to meet him the following morning about 10:00 o'clock in his office, which I did. I was there at 10:00 o'clock the following morning.

On January 21, 1980, Hennessey met Terminal Manager Lee in his office. At such time, Lee either already had the documents Hennessey had given steward Robinson to present to Lee, or Hennessey had received the same back and gave the same documents to Lee.[14] In any event the facts are clear that there was discussion of the *Banyard* decision and related matter. What occurred is revealed in composite effect by the following credited excerpts from Hennessey's and Lee's testimony.

Excerpts from Hennessey's testimony:

Well, I had not received a copy of the discharge letter yet, and I had asked him whether or not I was, in fact, discharged. He said yes, that the letter would be in the mail. He told me that two of their trucks had been stopped that same morning that I had been discharged on Route 39 in [sic] Indiana state police, and asked me if I had been responsible for it.

to pull the load. Lee's testimony as to the events appears unsure and speculative. Whether or not Alkofer and Lee discussed the possibility of an equipment change and adjustment or the taking of the equipment to a nearby terminal, such would not affect the overall findings of fact. Were there such discussion, it could be based on statements by Alkofer and not what Alkofer had in fact done or said. Further, Lee may have instructed Alkofer to tell Hennessey that he would be fired if he did not pull the load. Again, if this were found, it would not affect the overall findings of fact. Considering Alkofer's practice concerning overweight tractor-trailers wherein the overweights were less than 500 pounds, I am persuaded that the question of change of equipment or the taking of the tractor-trailer to the south terminal was not discussed, and considering this and all of the facts, I am persuaded that Alkofer did not tell Hennessey that he would be terminated if he did not pull the tractor-trailer. I am persuaded, however, that Lee told Alkofer to terminate Hennessey if he did not pull the tractor-trailer to Benton Harbor, Michigan.

[12] The driver (who was sent to take the tractor-trailer from Marigold to Benton Harbor) had driven Respondent's pickup truck to the Marigold facility.

[13] The facts are based on a composite of the credited aspects of the testimony of Hennessey and Lee. Considering the logical consistency of all of the facts, and the lack of sureness indicated by Lee while testifying as compared to the sureness of testimony by Hennessey, I credit Hennessey's testimony over Lee's where in conflict.

[14] The evidence on this point was presented in a fragmented fashion. A finding that Lee had received the documents given to Robinson by Hennessey and had, some way or other, associated a PROD document with the same, or a finding that Hennessey gave Lee the same documents on January 21, 1980, or gave the same documents with a PROD document, or combination thereof, would not affect the overall findings in this case.

I told him no, that I hadn't, but I in fact had. I had called both the Illinois and the Indiana state police to inform them about the overload. He asked me whether or not I thought the few hundred pounds involved was all that important, and I told him no, that it didn't seem important enough to put my job on the line for, but that it all could have been resolved if Johnny had just instructed the loader to cut the load weight by 500 or 600 pounds.

He said that he wasn't going to be dictated to by a driver, that the other drivers pulled the overloads, that the company would pay the tolls on the Indiana tollway, that it was a very important account and incidents like this could have caused them some problems.

I asked him whether or not he had read the Court Reporter on the Banyard case and seen the bulletin from Frank Fitzsimmons. He had pointed out at the time that they were not signatories to the National Master Freight Agreement, and didn't believe that had anything to do with them. And he said he was not in a position to judge whether or not it was good law or bad law, and that they ran the company by what they considered to be the best management techniques.

Upon leaving I just told him, "I'll see you in court." Then I left.

Excerpts from Lee's testimony:

[A]nd Mr. Hennessey, I believe, sat down at that time. And he said that possibly what he had done, you know, he had acted a little bit hastily, and that he hadn't really thought it out fully what the consequences could be of his, you know, of his refusing to take this.

And that he should have also realized that we were trying to get him, or something along those lines, I don't remember the exact words. But that the afternoon dispatcher, Bill Huval, who normally dispatches the road men, had been purposely giving him runs that were very short, and they were just beyond the scope that would divide a city from a mileage load, which is generally about a 75-mile radius from Chicago, and that we were just keeping him at a minimum as far as his earning point. And that he should have figured that we were really out to get him.

* * * * *

No, that was the first time I had ever heard of anything of that nature. Then I said, this doesn't really change things, you know, you refused to do something. It was told to you several times and you were given options and what not, and you still refused to do it.

Then Mr. Hennessey became somewhat agitated and said that I was being stupid, that the company was going to pay for this, and that I, personally, was going to pay for this. He became quite upset and actually got up out of his chair and made what I would say is a threat about, you know, I'll have my day in court, I'm going to get you, or something to that nature, and then left my office.

On January 22, 1980, Terminal Manager Lee transmitted the following letter to Hennessey:

On January 18, 1980, at 4:00 A.M., you were dispatched on a load to Benton Harbor, Michigan. Before leaving the terminal, you conducted a Pretrip Inspection and signed a Pretrip form signifying that the equipment assigned you, Tractor #481 and Trailer #834, were safe and operative. You then left the terminal at 4:15 A.M. and drove to the shipper.

At 5:05 A.M., you called the dispatcher and told him your empty weight was 29,600 lbs. The shipper wanted to load 44,000 lbs. The dispatcher told you to go ahead and load after talking to the loader, who stated he could not change the order. The loader explained that this was due to the fact that the product is made up in 44,000 lb. batches and he needed the tank empty to make more product. You called back again at 5:25 A.M. and told the dispatcher your weight was about 73,600 lbs. The dispatcher told you to go with the load. You stated you would not run the load because it was heavy. The dispatcher explained to you how important the account was to the company and requested that you handle the load. The dispatcher told you that delaying the load would just antagonize the customer. You replied that you did not care about our problems with the account. At this point, the dispatcher told you he would call the terminal manager at home. The dispatcher contacted me at 5:30 A.M. The dispatcher and myself went over the new weight law in Illinois, which allows a 2,000 lbs. tolerance. I had received notice of this in the Illinois Trucking Association Newsgram, dated December 28, 1979. A letter had been written by me to my dispatchers on January 15, 1980, explaining this tolerance. We discuss the fact that the driver could not be fined nor ticketed within this 2,000 lb. tolerance of the gross weight. I instructed the dispatcher to tell Mr. Hennessey to deliver the load, or be terminated.

After our conversation, the dispatcher told you to run the load as it was or you would be terminated. Again, you refused to run the load. The dispatcher told you that he would send another driver down to take the load and that you were terminated.

To reiterate, your seniority as a driver at Transport Service Company is terminated as of January 18, 1980. Please return all equipment issued to you by Transport Service and your final check will be issued.

7. Hennessey testified to the effect that the reason that he refused to drive the tractor-trailer was because it exceeded the allowable weight limits and for three reasons

related thereto. Such reasons are as revealed from the following excerpts from his testimony.[15]

> Well, sir, there is three reasons. Number one, because it is against the law. Secondly, is because it is self-defeating for a driver to take excess material on a truck and thereby cut out the number of loads that are available, and thirdly because there is a safety problem. The more weight there is, the top-heavier the truck is and the more difficult it is to brake.

Hennessey later testified to the effect that he knew that the tractor-trailer as loaded did not constitute a safety problem. Further, Hennessey testified to the effect that he knew that he would not be fined in Illinois for the approximate 400 to 600 pounds of excess weight revealed by the total weight of tractor-trailer/load/driver. Such is revealed by the further credited excerpts from Hennessey's testimony.

> JUDGE STONE: Were you aware, on account of the tolerance, what did you think would happen if you were stopped by someone, say, in Illinois?
>
> THE WITNESS: In Illinois, I assumed I would have to remove whatever the excess was, you know, call the company and they would have to provide whatever services were necessary. In Indiana, I had no way of knowing.
>
> JUDGE STONE: But in Illinois, were you aware that there would or would not be fines, for example?
>
> THE WITNESS: I knew there would not be a fine.

8. At some point of time on or after January 25, 1980, and/or on or before January 31, 1980, Hennessey filed a formal letter of grievance against the Transport Service Company for illegally terminating him by letter dated January 22, 1980. Hennessey asserted that he was illegally discharged for refusing to violate the State of Illinois weight limit regulations.

Thereafter, a grievance committee held a hearing concerning Hennessey's grievance. Hennessey unsuccessfully attempted to get the committee to consider the Indiana weight laws as regards his grievance. Further, Hennessey attempted to have the committee consider the effect of the *Banyard* court decision upon his grievance. The committee limited its consideration to matter of the Illinois laws relating to weights and declined to consider the question of law raised by the *Banyard* decision. The minutes of the grievance hearing reveal a consideration of facts relating to Hennessey's grievance, a consideration of the tolerances as to weights allowed by Illinois law, and set forth the following:

> After a further discussion, a motion was duly made and seconded that the discharge be upheld based on the following:
>
> Evidence and testimony of the driver shows that he admits he did haul an overload during his employ. Also, his admission that because he was not getting longer runs and having a dispute with management about this, it was a major factor in refusing the load, using overweight as an issue.
>
> The company representatives, the union representative, and the grievant were called back into the room and so notified.

C. *Contentions—Conclusions*

1. Respondent contends that this proceeding should be deferred to the arbitration findings and decision relating to the discharge of Hennessey for his refusal to drive an overweight tractor-trailer on January 18, 1980. The General Counsel contends that the unfair labor practice issues, involved in this case, were not considered by the arbitration committee in its determination.[16]

I find merit in the General Counsel's contentions. The principal issue in this case concerns whether Hennessey engaged in *protected concerted activity* when he refused to drive an overweight tractor-trailer on January 18, 1980. The evidence fails to reveal that the tribunal considered whether Hennessey's refusal to drive the tractor-trailer because it was overweight constituted protected concerted activity. Rather, the facts tend to indicate that the tribunal rejected consideration of the legal issues involved in the question of "protected concerted activities" present in this case. Accordingly, Respondent's contentions that this proceeding should defer to the arbitration decision and findings are rejected.

2. The General Counsel contends and Respondent denies that Hennessey was engaged in protected concerted activity when he refused on January 18, 1980, to drive on the highways of Illinois a tractor-trailer which was overweight, but within a tolerance of 2,000 pounds, with respect to liability for a fine. It is clear that Respondent discharged Hennessey for his refusal on January 18, 1980, to drive a tractor-trailer which was overweight but within a 2,000-pound tolerance as regards liability for fines in accordance with Illinois law. If Hennessey's conduct constituted protected concerted activity, it is clear that Respondent has violated Section 8(a)(1) of the Act by its January 18, 1980, discharge of Hennessey. If Hennessey's conduct did not constitute protected concerted activity, it is clear that Respondent did not violate Section 8(a)(1) of the Act by its January 18, 1980, discharge of Hennessey.

Considering all of the facts, I conclude and find that Hennessey's conduct, in refusing to drive an overweight tractor-trailer, within the weight tolerance (relating to fines), did not constitute protected concerted activity. For a proper understanding of such conclusion and finding, I set forth the following:

(a) There appears some dispute in the evidence as to whether Hennessey was motivated in his refusal to drive the tractor-trailer on January 18, 1980, by his awareness that the tractor-trailer was overweight as regards Indiana

[15] I credit Hennessey's testimony only to the effect that he was motivated to refuse to drive the tractor-trailer because he knew the weight to exceed the allowable state limit for Illinois, and that he believed it to be self-defeating for a driver to take excess material and thereby cut the possible number of available loads for drivers.

[16] See *Varied Enterprises, Inc. d/b/a Private Carrier Personnel*, 240 NLRB 126, 132 (1979).

law, and that *Hennessey* did not know that Indiana had a 1,000-pound tolerance (for fines). Considering the overall facts and *Hennessey's* grievance as filed, I am persuaded that the question of an overweight load as considered by Hennessey on January 18, 1980, and the basis for his refusal to drive the tractor-trailer, was limited, that his reason for refusal to drive such tractor-trailer was based on his belief that the overweight tractor-trailer when driven on the Illinois highways would constitute an act violative of Illinois law.[17]

(b) Respondent appears to argue that the driving of overweight tractor-trailers on Illinois or Indiana highways, if the overweights are within the tolerance allowed by statute concerting provisions for no fines, would not be violative of state law or laws. I reject such contention. It appears reasonable to conclude that the tolerance laws were intended to take care of an inadvertent overload (excessive weight of tractor-trailer/load/and driver) and not to legalize an intentional overload (excessive weight of tractor- trailer/load/and driver).

Thus, a tractor-trailer/load/and driver might be dispatched from a point in the State of Michigan with a total weight within the 80,000-pound legal weight limit for Michigan. Such dispatch might be intended to involve travel through the States of Indiana and Illinois. Expected disposal of part of the load or usage of fuel might reasonably be anticipated to diminish the weight transported (of the tractor-trailer/load/and driver). As a result of such diminishment of weight, it might reasonably be anticipated that the weight of the tractor-trailer/load/and driver would be within the lawful weight limits (73,280 pounds) by the time the dispatched vehicle traveled on the highways of Indiana and Illinois. In actuality, by an inadvertent mistake in judgment or unexpected events, the total weight, as diminished, might still exceed the lawful weight limits. In my opinion, the tolerance laws obviously were enacted to take care of this type of situatlon as a matter of reasonable understanding of problems. On the other hand, it simply is not reasonable to believe that a State by enactment of weight laws and of tolerance laws intended to prohibit and at the same time legalize having vehicles with excessive weights traveling on its highways.

(c) The General Counsel appears to argue that the *Banyard* court decision stands for a proposition that when a driver refuses to follow an order requiring him to violate state law, such refusal constitutes protected concerted activity.[18] I am not persuaded that argument is correct. Rather, as I read the *Banyard* decision, the court merely set forth its basis for refusing to *honor* an arbitration award and directed the NLRB to consider the unfair labor practice issues on the merits thereof.

(d) The General Counsel argues that the Board's policy of presuming concerted activity, if such activity is related to benefits arising out of a safety statute legislated for the benefit of all employees, is applicable to the facts of this case. It was clear at the hearing of this matter that "safety" was not the reason for Hennesey's refusal to drive the tractor-trailer on January 18, 1980. The parties were requested to brief the question of *whether* refusal to obey instructions to violate state laws, unrelated to safety or benefits, constituted protected concerted activities. The briefs as submitted appear to allude to cases involving conduct relating to safety or statutory benefits. The instant case involves not a benefit which enures to an employee or employees but to a question of violation of law by the employee. Since the overall facts reveal that Hennessey's conduct on January 18, 1980, was not concerted activity, many interesting questions, as suggested above, do not have to be answered.

(e) It is clear that Hennessey was not concerned that he would be fined or penalized if he drove the overweight tractor-trailer on January 18, 1980. It is noted, however, that Indiana law (sec. 9-8-1-18) provides for joint and several responsibilities for damages by the owner and operator of the overweight vehicle.

(f) The overall facts reveal that Respondent, as a matter of practice, has dispatched tractor-trailers if the overweights were small and within the weight tolerances which eliminated the question of fines. The facts reveal that, excepting for Hennessey's, there have been no complaints made or grievances filed, and that other employees have simply followed Respondent's orders to drive such tractor-trailers. Considering all of the facts, including Hennessey's obvious interests in not driving overweight tractor-trailers, I find it improper to presume that Hennessey was acting at the behest of, or in concert with, other employees in complaining about driving an overweight tractor-trailer. The overall facts reveal that Hennessey's refusal to drive the tractor-trailer on January 18, 1980, was not based on a belief that the driving of the tractor-trailer was unsafe.[19] Rather, I am persuaded that the overall facts reveal that Hennessey refused to drive the tractor-trailer on January 18, 1980, because he believed from his understanding of the *Banyard* court case that he had a right to refuse to drive an overweight tractor-trailer in violation of state law. In sum, the facts do not reveal that Hennessey's refusal to drive the tractor-trailer on January 18, 1980, constituted protected concerted activity. Accordingly, Respondent's discharge of Hennessey for his refusal to drive the overweight tractor-trailer on January 18, 1980, did not constitute conduct violative of Section 8(a)(1) of the Act.[20]

[17] However, if it were found that Hennessey's refusal to drive such tractor-trailer was because of a question of violation of Indiana law, the ultimate findings would remain the same.

[18] *Banyard* v. *N.L.R.B.*, 505 F.2d 342 (1974).

[19] Some of the General Counsel's questioning of Hennessey was directed to whether he was aware of certain laws. The answers to such questions, as an example, established a general awareness of certain Federal regulations but did not establish that Hennessey was relying on such regulations as a basis for his refusal to drive the tractor-trailer on January 18, 1980.

[20] The National Labor Relations Board is only empowered to enforce the National Labor Relations Act. If Hennessey had acted in concert with other employees concerning his refusal to drive an overweight truck, such conduct would be protected. Be that as it may, nothing in this Decision is to be construed as condoning Respondent's apparent intentional violation of state law. It would also appear that the respective States, or Federal agencies having responsibilities to enforce transportation and highway laws, can enforce their statutes and, if necessary, secure additional legislation to protect their interests and protect employees or others who may be directed to violate the laws of such jurisdictions. It very well may be that intentional violations of Illinois, or Indiana, weight

Continued

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

laws discussed in this case, if not remedied by removal of excess weights upon order by state authorities, leave the driver and owner liable for fines with respect to such overweights if such is provable.

CONCLUSIONS OF LAW

1. Transport Service Co., Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The facts do not reveal that Respondent, as alleged, has violated Section 8(a)(1) of the Act.

[Recommended Order for dismissal omitted from publication.]